SUPREME COURT, U. S.

FILED

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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1192

New York Central Railroad Company, a Delaware Corporation, a/k/a Penn Central Transportation Company (Debtor in Reorganization), a Pennsylvania Corporation,

Petitioner,

v.

Winifred Pinzur, as Administratrix of the Estate of Henry Pinzur, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 28, 1970.

TABLE OF CONTENTS

	Page
Opinion and Orders Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provision Involved	4
Statement of the Case	5
A. The Proceedings Below	5
B. The Facts	7
1. Evidence at the First Trial—Relations Between Transport and Railroad	7
Physical Operation of Transport	8
Workmen's Compensation	9
2. The Order for a New Trial	9
3. Additional Testimony at the Second Trial	10
4. The Charge at the First Trial	10
5. The Charge at the Second Trial	11
Reasons for Granting the Writ:	
I—Submission to the jury below is inconsistent with two recent decisions of this Court on trucking or other service related to railroads and the most recent case in the Court of Appeals	11
A. The nature of the operation—*American Trucking* v. *A., T. & S. F. R. Co.*, 387 U. S. 397 (1967)	11
B. The performance of some Railroad functions does not give the employee rights under F.E.L.A if his employer is not involved in actual railroad operations—*Edwards* v. *Pa-*	

PAGE

cific Fruit Express Co., 390 U. S. 338 (1968) and McCrea v. Harris County Houston Ship Channel Nav. Dist., 423 F. 2d 605 (C. A. 5, 1970) 12

II—Submission to the jury below is in direct conflict with two decisions of a State Supreme Court and a Court of Appeals as to the scope of the applicability of the F.E.L.A. as applied to an employee of a trucking affiliate of a Railroad 13

A. The Supreme Court of Missouri 13

B. The Courts of Appeal, Fifth and Seventh Circuits 14

III—The decision below, excluding evidence as to workmen's compensation, is in conflict with the most recent decision in the Court of Appeals and not supported by authority in this Court .. 15

A. The Court of Appeals, Fifth Circuit 15

B. *Tipton v. Socony Mobil Oil Co.*, 375 U. S. 34 (1963), relied on by Judge MacMahon is not in point 16

IV—Certiorari is appropriate 17

Conclusion 17

APPENDIX:

Order Granting Motion for New Trial 1a

Judgment 2a

Cases Cited

American Trucking v. A., T. & S. F. R. Co., 387 U. S. 397 (1967) 11

PAGE

Czaplicki v. S8 Hough Silverwheel, 351 U. S. 425 (1956) 15

Dicks v. Cleaver (No. 28734, September 15, 1970, Opinion by Chief Judge Brown, not yet officially reported) 15

Dougall v. Spokane, P. & S. Ry. Co., 207 F. 2d 843, 846 (9 C. 1953) 13

Edwards v. Pacific Fruit Express Co., 390 U. S. 538 (1968) 12, 13, 16

Fawcett v. Mo. Pac. RR Co., 242 F. Supp. 675 (1963 W. D. La.), aff. 347 F. 2d 243 (5 C. A. 1965), cert. den. 382 U. S. 907 (1965) 14

McCrea v. Harris County Houston Ship Channel Nav. Dist., 423 F. 2d 605 (C. A. 5, 1970) 12, 13

Phelps v. M.K.T.R. Co., —— Mo. ——, 438 S. W. 2d 181 (Sup. Ct. Mo. 1968) 13

Schroeder v. Pennsylvania Railroad Company, 367 F. 2d 452 (C. A. 7, 1966) 14, 16

Smith v. Norfolk & Western Railway Company, 407 F. 2d 501 at 503 (4 C. A. 1969) 13

Tipton v. Socony Mobil Oil Co., 375 U. S. 34 (1963) .. 16

Turpin v. Chicago, Burlington & Quincy RR Co., —— Mo. ——, 403 S. W. 2d 233 (Sup. Ct. Mo. en banc 1966), cert. den. 384 U. S. 1003 14

STATUTES CITED

§ 28 U.S.C. 1254(1) 2

Section 1 of the Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended by 53 Stat. 1404 (1939), 45 U.S.C. § 51 4

In the

Supreme Court of the United States

OCTOBER TERM, 1970

No.

New York Central Railroad Company, a Delaware Corporation, a/k/a Penn Central Transportation Company (Debtor in Reorganization), a Pennsylvania Corporation,

Petitioner,

v.

Winifred Fisher, as Administratrix of the Estate of Hazel Fisher, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Penn Central Transportation Company, Debtor in Reorganization (hereinafter "Railroad") respectfully prays that a writ of certiorari issue to review the final judgment of the Court of Appeals for the Second Circuit dated October 15, 1970.

Opinions and Orders Below

On November 13, 1969, the District Court for the Southern District of New York entered judgment in the amount of $250,000 in favor of respondent, Winifred Fisher, as

Administratrix of the Estate of Henry Fisher, Deceased, against Railroad. No opinion was rendered by the District Court except an indorsed memorandum by Judge MacMahon granting plaintiff's motion to set aside the first verdict which is appended hereto at page 1a.

No opinion was rendered by the Court of Appeals for the Second Circuit affirming the judgment of the District Court.

Jurisdiction

The date of the judgment of the Court of Appeals sought to be reviewed is October 15, 1970. It was entered on the same day. A copy of that judgment is appended hereto at page 2a.

This Court's jurisdiction is invoked pursuant to § 28 U.S.C. 1254(1).

Questions Presented

1. Is there a jury question as to whether a plaintiff representing an employee of record of a trucking subsidiary of a railroad may recover for his death from the railroad under Federal Employers' Liability Act when:

a) There is no claim of the negligence of the railroad as such, but only of deceased's co-workers.

b) The railroad owns the trucking company's stock and has made unrepaid advances to it which are only a fraction of the trucking company's net worth accumulated from operating gains.

c) All of the subsidiary's directors except one are officers or employees of the railroad.

d) There are no officers in common except a secretary whose functions are limited to formal corporate record keeping.

e) The subsidiary's officers receive their compensation solely from the subsidiary and do not share in the railroad's officer's pension plan. Transportation activities of the subsidiary are directed by it, not the railroad.

f) Subsidiary employees other than officers are entirely separate from railroad employees with separate labor representation under separate contracts with different unions for subsidiary employees. They are paid by the subsidiary. They have different skills and supervisors than railroad employees and there is no interchange of employees. The subsidiary's employees were in the Social Security system, not the Railroad Retirement system, and the subsidiary carried Workmen's Compensation for its employees.

g) The subsidiary's vans are loaded on to the railroad cars by subsidiary employees without direction from railroad employees. Railroad employees do not inspect until after loading has been completed and took no part in the events leading to the death herein. The subsidiary owned or leased its own terminals on or near the railroad's lines and maintained its own separate offices.

h) The subsidiary receives its own income including that from operations under joint tariffs, keeps separate accounts and has separate accountants.

i) The subsidiary owns and finances its own equipment separate from the railroad and appropriate to a trucking company with no use by or for the railroad except in joint tariff operations. It has business unrelated to Railroad.

j) The railroad files tariffs on behalf of the subsidiary as well as for others and has transferred to the subsidiary certain certificates for local substituted service which constitute only a small proportion of the subsidiary's business.

k) The railroad takes care of the subsidiary's advertising, collections and billing and solicits shipments under joint tariffs.

l) Plaintiff applied for and received Workmen's Compensation on account of the death of her husband.

2. When the issue of the identity of the employer is to be determined and an election of remedies to take compensation has been pleaded, may the facts that the employer of record carried Workmen's Compensation for the deceased and that plaintiff sought and obtained such compensation be admitted?

Statutory Provision Involved

The statutory provision which the case involves is Section 1 of the Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended by 53 Stat. 1404 (1939), 45 U.S.C. § 51:

AN ACT

To amend the Employers' Liability Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 1 and 4 of the Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases", approved April 22, 1908 (35 Stat. 65; U.S.C., title 45, secs. 51 and 54), be, and they are hereby, amended to read as follows:

"Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be

liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

Statement of the Case

A. The Proceedings Below

The amended complaint bases the claim of jurisdiction solely on the Federal Employers' Liability Act. Deceased, as employee of New York Central Transport Company (the subsidiary, hereinafter "Transport"), is claimed to have been "on loan to defendant". The second "cause of action" claims Transport was "a subsidiary, arm, adjunct and in effect an extension of defendant" so that deceased was employed by defendant.

The answer denies the material allegations of the amended complaint and pleads affirmatively that there was no employment relationship between deceased and defendant. Transport is alleged to have certified to the New Jersey workmen's compensation authorities that deceased received his injuries as its employee and compensation was established and accepted by plaintiff and her children. Election of remedies is claimed barring the action.

There have been three trials of the two issues presented arising out of the death of plaintiff's decedent while taking part in attaching a "Flexi-Van" owned by his employer of record, Transport, to a flatcar owned by Railroad on the tracks of Railroad at the North Bergen, N. J. yard of Transport.

The first trial in the Southern District of New York was limited to the issue of whether deceased was an employee of Railroad. Judge MacMahon submitted the issue to the jury, reserving on motions. The jury's answer was in the negative.

Plaintiff moved for a new trial. Judge MacMahon granted the motion on the ground that evidence as to Workmen's Compensation benefits paid by Transport's insurer was improperly received.

The second trial likewise was limited to the issue of employment. Judge Croake submitted the issue to the jury after a trial in large part on the same evidence, without evidence on Workmen's Compensation paid by Transport's insurer and with the addition of evidence from deceased's co-workers present at the accident. The jury's verdict was in the affirmative. Railroad's offer of proof as to compensation benefits was denied. Likewise motions to dismiss at the end of plaintiff's case and for a directed verdict at the close of the case were denied along with Railroad's motion after the verdict for judgment n.o.v.

The third trial was on the issue of negligence, contributory negligence and damage. Plaintiff's verdict on these issues is not here raised as an issue.

B. The Facts

1. *Evidence at the First Trial*

Relations Between Transport and Railroad

Railroad owns all of Transport's outstanding stock. It has also made outstanding advances beyond the original capitalization of $1,000.00 in 1956 of about $2,600,000. From retained earnings, Transport, in the year of the accident, 1967, had a net worth over $6,400,000 and the following year almost $9,000,000.

Transport's Board of Directors has always consisted of one Transport officer with the remainder being officers or employees of Railroad. The officers of Transport are not officers of Railroad and no officer of Railroad is an officer of Transport, except a Secretary whose function is limited to corporate records.

Transport's officers receive their compensation from Transport alone. Historically they were recruited from the trucking industry rather than the railroad. There is no interchange of either officers or employees between the two because of different skills required. Railroad's officers had a pension plan in which Transport's officers do not participate. The single interchange of officers was when the President of Transport was replaced at the original President's resignation. At that time the new President had to resign from Railroad and give up his rights in the railroad pension plan.

Transport's employees have separate rights, being in the Social Security system rather than under Railroad Retirement. They are not subject to the Railway Labor Act. Transport employees are under a contract with the Teamsters union, not Railroad Brotherhoods. A purpose of employing Transport's original President from the

trucking industry was so that he might have his own labor relations with the Teamsters as part of the trucking industry.

Transport, pursuant to its contract with the Teamsters, carried workmen's compensation.

Transport owns and finances its own equipment including trailers, bogies and tractors mostly acquired under its own chattel mortgages. In the year of the accident more than 50% of its equipment was in Flexi-Vans which accounted for some 90% of its business.

The terminals occupied by Transport were mostly built by it. It occupies its own separate offices where no railroad employees are located. The headquarters of the two companies are in adjoining buildings.

Transport fixes its own tariffs setting forth the portion of the revenue each company receives. There are also inclusions for other carriers who receive a portion of joint rates. These tariffs are in addition to certificates for intra-state motor service, some of which were transferred fom Railroad covering supplemental and substituted service for Railroad. This service is not large in relation to the joint Flexi-Van service carried on with Railroad and with other carriers or to private cartage not related to Railroad and was not involved in the accident.

For the joint Flexi-Van service, Transport has no sales department of its own, does not send out its own bills or make its own collections nor pay for advertising the joint service. The tariffs are filed by Railroad as are those of private unaffiliated companies.

Transport maintains its own separate accounts on a different accounting system.

Physical Operation of Transport

At all times the transportation operations of Transport were carried on solely by that company without advice from the railroad.

The mounting of Flexi-Vans on railroad flatcars is performed by Transport employees, is part of the Teamster work and would not under the contracts be performed by railroad labor. The usual procedure was followed in this particular case. The designation of the trailer and the car on which it was to be loaded was made by the Transport supervisor who assigned a team of men to load the van on the car without Railroad employees being involved. There was no inspection or other involvement by Railroad "car knockers" until after the vans were loaded. Railroad supplied the flatcars designated by Transport. The function of Railroad in the operation was to move the car after the van had been loaded thereon. The particular van involved in the accident was brought to Transport's North Bergen yard by an independent carter, AIDS, for shipment to Chicago. Transport received it when it was parked by the AIDS driver. The Transport supervisor assigned a team of Transport drivers to load it on a car he designated. No Railroad men were involved in the operation which caused the death.

Workmen's Compensation

The plaintiff, prior to the institution of the action for herself and her children, applied for and received workmen's compensation in New Jersey under Transport's policy on the basis of Transport being the employer. There was no contest.

2. *The Order for a New Trial*

Judge MacMahon set aside the verdict at the first trial that deceased was an employee solely of Transport only on the ground that "The probative value of the evidence that Plaintiff applied for and received, Workmen's Compensation benefits by reason of her husband's employment by an employer other than Defendant is, necessarily, outweighed by its prejudicial impact on the jury". No other ground had been raised.

3. *Additional Testimony at the Second Trial*

In addition to again reading of the plaintiff's depositions of witnesses Hoffman for Railroad and Reynolds for Transport and minus any testimony for Railroad as to workmen's compensation as to which there was only an offer of the proof produced at the first trial, plaintiff produced two employees who were in the crew with deceased at the time of the accident.

These two employees testified that like deceased and their supervisor, they received their pay from Transport. Like deceased, they paid Social Security not Railroad Retirement.

Like all drivers, including deceased, they were members of the Teamsters. Their supervisor sometimes received instructions from the Transport office. No Transport employee ever received any instructions from any car knocker or other railroad employee. If the car knocker gave any instructions to the Transport office, they received these only through their own supervisors. At this particular accident there were no instructions from any Railroad employee.

4. *The Charge at the First Trial*

The burden of proving employment by the railroad was on plaintiff. Mere unloading or loading is not necessarily railroad work. The question to be determined is, was there supervision by the railroad and this is determined by the extent of any supervision which is not determined by the ownership of stock, the existence of common officers or directors, but whether the corporations dealt at arms length, paying for services rendered and negotiating their own labor contracts.

5. *The Charge at the Second Trial*

The issue is to be determined by the test of day to day control. Stock ownership, common officers and directors or the factors of engagement in loading and unloading are not enough. Likewise, whether Social Security or Railroad Retirement was paid was only one factor. An important factor was whether intercorporate affairs were carried on in a business-like way.

The fatality did not occur in connection with substituted service, but in an activity from which each corporation received its share from the revenue. The direction of the details of the decedent's work determined whose employee he was.

REASONS FOR GRANTING THE WRIT

I

Submission to the jury below is inconsistent with two recent decisions of this Court on trucking or other service related to railroads and the most recent case in the Court of Appeals.

A. The nature of the operation—*American Trucking* v. *A., T. & S. F. R. Co.*, 387 U. S. 397 (1967).

The issue in *American Trucking* was whether railroads could be ordered by the Interstate Commerce Commission to make Trailer on Flatcar service (TOFC), such as Flexi-Van service here involved, available to all, including motor carriers and freight forwarders, for rail service through the use of open tariff TOFC rates published by rail carriers. The I.C.C.'s decision to this effect was upheld in this Court. The result is that a van being placed on a flatcar is a commodity a railroad must ship to the same extent as if it were coal in a hopper car or grain in a box car. This Court adopted the language of the Interstate Commerce Commission to define the industry and its various

forms. As to Plan V, here involved, it was described:

> "Plan V (Joint Intermodal):
>
> Joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement, and traffic moves on originating carrier's bill of lading." (387 U. S. at 403)

The decision was bottomed on the statement in the majority opinion (420) "The controlling fact of the matter is that all piggyback service is, by its essential nature, bimodal. It partakes of both the railroad and the trucking functions."

The application of such rule is that Transport's operations even if carried on in conjunction with the Railroad, even indeed had there been a single corporation, was still the trucking function of the bi-modal operation.

B. The performance of some Railroad functions does not give the employee rights under F.E.L.A. if his employer is not involved in actual railroad operations—*Edwards v. Pacific Fruit Express Co.*, 360 U. S. 538 (1960) and *McCrea v. Harris County Houston Ship Channel Nav. Dist.*, 423 F. 2d 625 (C. A. 5, 1970).

In *Edwards*, the holding was that being engaged in an industry related to the Railroad industry and performing some railroad functions will not bring a claimant within the jurisdiction of F.E.L.A. even though claimant was an employee of a railroad affiliate. There, this Court held (see 539-541) that the fact that the employee of the affiliate was engaged in the business of providing and servicing insulated railroad cars for the carriage of perishable commodities and thereby performing some railroad functions did not bring him within the jurisdictional section of F.E.L.A. (45 U.S.C. 51).

In *McCree* the affiants held not subject to F.E.L.A. was engaged in unloading grain from railroad cars from various railroads.

Undoubtedly plaintiff will argue that these cases have no application because Railroad and not Transport is here being held. While the defendants in *Edwards* and *McCree* were in the position of Transport, the Court should not lose sight of the fact that even if we are to consider deceased an employee of Railroad, his function, which *Edwards* makes decisive, was merely unloading and it is well settled as held in *Smith* v. *Norfolk & Western Railway Company*, 407 F. 2d 501 at 503 (4 C. A. 1969) "• • • historically and traditionally the railroad is responsible neither for loading nor unloading". Of course, deceased was not an employee of Railroad within the F.E.L.A. because his compensation came from Transport and employment under F.E.L.A. connotes a rendering of services for compensation. *Dougall* v. *Spokane, P. & S. Ry. Co.*, 207 F. 2d 843, 846 (9 C. 1953).

II

Submission to the jury below is in direct conflict with two decisions of a State Supreme Court and a Court of Appeals as to the scope of the applicability of the F.E.L.A. as applied to an employee of a trucking affiliate of a Railroad.

A. The Supreme Court of Missouri.

1. *Phelps* v. *M.K.T.R. Co.*, —— Mo. ——, 438 S. W. 2d 181 (Sup. Ct. Mo. 1968), is almost indistinguishable from this case. Plaintiff was an employee of a wholly owned trucking affiliate with common officers and directors. The degree of separation in operations was much less clear than in the present case. The injury took place while plaintiff was loading a tractor on a flatcar. Following *Turpin* and *Fawcett* (*infra*), the Court had no difficulty

in holding that the verdict below for plaintiff was improper and that defendant should have had a directed verdict. Questions of both physical and corporate control were passed on.

This Court granted certiorari in *Phelps*, 393 U. S. 1061, but the action was not prosecuted here.

2. *Turpin* v. *Chicago, Burlington & Quincy RR Co.*, —— Mo. ——, 403 S. W. 2d 233 (Sup. Ct. Mo. en banc 1966), cert. den. 384 U. S. 1003. This case again involved the employee of a trucking affiliate. After a verdict for plaintiff, the Trial Court entered judgment for defendant and the judgment n.o.v. was affirmed. Plaintiff was a truck driver of a wholly owned subsidiary of comparable size and operation to Transport. The injury took place while loading a piggyback car on a flatcar. He received Workmen's Compensation from the affiliate. Both the questions of intercorporate relations and actual control of the operation were discussed at length and decided as a matter of law.

B. The Courts of Appeal, Fifth and Seventh Circuits.

1. *Fawcett* v. *Mo. Pac. RR Co.*, 242 F. Supp. 675 (1963 W. D. La.), aff. 347 F. 2d 243 (5 C. A. 1965), cert. den. 382 U. S. 907 (1965). Plaintiff was an employee of a wholly owned subsidiary injured while unloading freight. Summary judgment for the railroad was affirmed.

2. *Schroeder* v. *Pennsylvania Railroad Company*, 367 F. 2d 452 (C. A. 7, 1968). In this case, which plaintiff will no doubt refer to, no affiliate of the railroad was involved. The so-called independent contractor, it was held, permitted so much actual control of the operation by the railroad that there a jury question was permissible.

III

The decision below, excluding evidence as to workmen's compensation, is in conflict with the most recent decision in the Court of Appeals and not supported by authority in this Court.

A. The Court of Appeals, Fifth Circuit.

The Fifth Circuit in *Dicks* v. *Cleaver* (No. 28734, September 15, 1970, Opinion by Chief Judge Brown, not yet officially reported) held:

> "The problem here is whether a jury, required under the classic test for estoppel to decide whether a party has been misled into action by the adversary, is entitled to know the facts bearing upon who the real party is. More specifically it is whether, in an otherwise run-of-the-mill automobile tail-gating damage suit, the plaintiffs were entitled to prove that the same insurance company was both the workmen's compensation insurer and automobile liability insurer of the named defendant. We hold such testimony to have been here admissible and reverse." (Slip Opinion, 2)

The Court's reason for reaching this result was that without testimony as to the existence of Workmen's Compensation coverage, the relevant facts as to the true interests involved could not be brought home to the jury. The Court referred by way of analogy to *Czaplicki* v. *SS Hough Silvercloud*, 351 U. S. 425 (1956). (Slip Opinion, 14-15).

It is submitted that without such testimony in the present case, there is not a complete record as to the incidence of employment of the deceased by Transport from which it can be determined whether he was entitled to claim benefits under F.E.L.A. as an employee of Railroad.

B. *Tipton* v. *Socony Mobil Oil Co.*, 375 U. S. 34 (1963), relied on by Judge MacMahon is not in point.

Neither the procedural nor the substantive context in *Tipton* was the same as here presented. This Court there sets forth at length (375 U. S. 35, 36) that there were references throughout the trial to the subject of compensation while here it played a very small part in the trial. In *Tipton* there was elaborate discussion of the subject in the charge. Here there was none. Further, the Court in *Tipton* must have had in mind *Reed* v. *Yaka*, 373 U. S. 410. This then recently decided case permitted dual recovery in maritime cases not permitted here.

Schroeder (*supra*), also mentioned by Judge MacMahon adds no independent reasoning, but merely cites *Tipton* on this subject.

Edwards (*supra*), post-dating *Tipton* in this Court, takes a different view of the subject. The Court stated, 390 U. S. at 543:

> "Thus, for 60 years the Federal Employers' Liability Act has been administered with the understanding that refrigerator car companies are not included within the terms of the Act. During that time injured employees have been taken care of under state compensation laws. In fact the petitioner here has already drawn more than $6,000 under the California compensation law. The question of whether employees shall rely on state compensation or on the Federal Employers' Liability Act is a pure question of legislative policy, concerning which apparently even the labor organizations most interested have been divided. Under these circumstances we do not think this Court should depart from 60 years of history to do what is a job for Congress."

IV

Certiorari is appropriate.

In *American Trucking*, it was pointed out that bimodal operations have had an explosive growth (37 U. S. at 401). This Court should not leave in doubt, uncontrolled by a clearly stated rule of law, whether employees of a trucking affiliate of a railroad performing what is clearly the trucking and not the railroad function of the bimodal operation are governed by State compensation laws or the Federal Employers' Liability Act. This is a subject on which the Court has not spoken.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

December 28, 1970.

Respectfully submitted,

James L. Morr,
Attorney for Petitioner,
466 Lexington Avenue,
New York, New York 10017.

Order Granting Motion for New Trial.

Endorsement

67 Civ. 1295

Plaintiff moves, pursuant to Rule 59, Fed. R. Civ. P., for a new trial claiming error in the court's admitting evidence of plaintiff's having applied for, and received, workmen's compensation benefits, and in the court's failure to instruct the jury on this evidence.

The trial of this case was limited to the question of whether plaintiff's deceased husband was an employee of the defendant-railroad, within the meaning of the Federal Employer's Liability Act, 45 U.S.C. § 51 et seq.

The probative value of the evidence that plaintiff applied for, and received, workmen's compensation benefits by reason of her husband's employment by an employer other than defendant is, necessarily, outweighed by its prejudicial impact on the jury. See *Tipton* v. *Socony Mobil Oil Co.*, 375 U. S. 34 (1963); *Schroeder* v. *Pennsylvania R.R. Co.*, 397 F. 2d 452 (7th Cir. 1968).

Accordingly, we grant plaintiff's motion for a new trial.

So ordered.

Dated: New York, New York
July 22, 1969.

LLOYD F. MACMAHON,
United States District Judge.

Judgment.

UNITED STATES COURT OF APPEALS.
FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of October, one thousand nine hundred and seventy.

Present: HON J. EDWARD LUMBARD, Chief Judge,
HON. TOM C. CLARK, Associate Justice,
HON. IRVING R. KAUFMAN, Circuit Judge.

Winifred Fisher, as Administratrix of the Estate of Henry Fisher, Deceased,

Plaintiff-Appellee,

v.

New York Central Railroad Co., a Delaware Corp., n/k/a Penn Central Transportation Company,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant, New York Central Railroad Co.

A. DANIEL FUSARO,
Clerk.